

warehouse, were in good order and condition, in the sense in which that expression must be understood, having regard to the purpose for which they were intrusted to defendants, that is to say, in such order and condition that, had they been properly cared for by defendants, they would have kept sound and fit for consumption, at all events for some time beyond 12th August. In addition to the inconclusiveness, as I view it, of the evidence adduced by plaintiffs to establish this, there was against that evidence the failure of plaintiffs to make out the only specific act of negligence charged, and the evidence on the part of defendants and of their manager called by plaintiffs . . . which tended to shew, if it did not establish, that due care had been used by defendants, and therefore to shew that the fish could not have been in good order and condition when received, which might well, I think, have been the case, even though the usual objective symptoms of it were not apparent to the eye.

Having regard to what was conceded on all hands, I am unable to see how defendants can be made liable because of their omission to examine the fish to see how they were keeping. For an examination of the fish and the discovery that they were not keeping would have been of no service to plaintiffs, because, *ex concessis*, having commenced to spoil nothing could be done to save them. . . .

Appeal allowed with costs, action dismissed with costs, and judgment for defendants on their counterclaim with costs.

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JANUARY 7TH, 1905.

DIVISIONAL COURT.

MOTT v. GRAND TRUNK R. W. CO.

*Railway—Injury to Person Crossing Tracks—Workman in Grain Elevator—Tracks in Elevator—Shunting Engine—Negligence—Warning—Findings of Jury—New Trial.*

Appeal by defendants from judgment of MAGEE, J., upon the findings of a jury, in favour of plaintiff for \$1,200 damages, and motion by defendants, in the alternative, upon affidavits, for a new trial.

Action brought under R. S. O. 1897 ch. 166, by widow of Charles Mott, to recover damages for his death, which, as she alleged, was caused by the negligence of defendants. The action was brought for the benefit of the widow herself and four named children of deceased.

Deceased died on 22nd October, 1903, as the result of an injury which he received two days earlier. He was employed by the Midland Elevator Co. at their elevator in Midland,